

**WOMEN, AND ALL OF US:
ARTICLE 5(A) CEDAW AS A PROTECTION
FOR ALL GENDERED INDIVIDUALS**

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This article explains the disruptive potential of Article 5(a) of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) building on psychoanalytical, feminist and queer theories. Reading CEDAW through the prism of Article 5(a) makes the Convention an instrument to protect not only women from the adverse effect of gender-stereotyping, but all individuals. This reinterpretation of Article 5(a) contrasts with mainstream interpretations of femininities and masculinities, portraying femininity as vulnerability and masculinity as domination. By comparing the scope and principles of CEDAW with those incorporated in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), I show that the reinterpretation of Article 5(a) CEDAW supports a renewed understanding of gendered domination-subordination under international human rights law. The norm can secure the rights

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of all gendered individuals by requiring states to eradicate preconceptions and practices based on the ideas of inferiority or superiority of certain forms of masculinity or femininity. Albeit contained in an instrument focused on one specific gendered group ('women'), Article 5(a) enshrines a symmetrical configuration sex/gender in relation to men-women, masculinity-femininity and inferiority-superiority which allows this provision to protect all of us. The provision finally opens to the uniqueness of subjective positionalities in psychoanalytical terms, by addressing gender stereotyping as a constraint to existential possibilities.

Keywords: CEDAW, discrimination, gender, ICERD, stereotyping.

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I INTRODUCTION

Article 5(a) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a key provision for the protection against gender-based discrimination.¹ Focussing on the ideas of inferiority and superiority attached to either men or women, Article 5(a) prohibits harmful stereotypes based on gender that cause discrimination. This article argues that the reinterpretation of Article 5(a) as covering various gender power differentials helps rethink CEDAW – a convention focused on women – as protecting all gendered subjectivities. Rethinking Article

¹ Article 5 Convention on the Elimination of All Forms of Discrimination against Women (1979) 1249 UNTS 13.

5(a) means also rethinking the whole instrument as influenced by a renewed, ‘all-gender,’ approach.

Unlike the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR),² CEDAW adopts an asymmetrical definition of discrimination, focusing on one sexed group, i.e., women, whose enjoyment of rights is to be gauged against another sexed group, i.e., men. Under Article 1 CEDAW, discrimination against women refers to any gender-based distinction, exclusion or restriction having the effect or purpose of ‘impairing or nullifying the recognition, enjoyment or exercise by women, [...] on a basis

² The UDHR provides for everyone’s right to enjoy the rights and freedoms enshrined in the same instrument without ‘distinction of any kind,’ including ‘sex.’ Likewise, ICESCR and ICCPR prohibit sex-based discrimination as instrumental to the achievement of equality of men and women in the enjoyment of the rights enumerated in the Covenants: Article 2(2) International Covenant on Economic, Social and Cultural Rights (1966) 993 UNTS 3; Article 2(1) International Covenant on Civil and Political Rights (1966) 999 UNTS 171. Similar provisions are contained in the three regional human rights instruments, namely the Banjul Charter, the Pact of San José, and the European Convention on Human Rights (ECHR): Article 2 African Charter on Human and Peoples’ Rights (1998) OAU Doc. CAB/LEG/67/3 rev. 5; Article 1 American Convention on Human Rights (1969) OASTS 36; Articles 1 and 14 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS 005. The ICCPR also contains the free-standing guarantee of equality before and equal protection by the law without discrimination. As such, the guarantee of equality covers not only the enjoyment of other human rights, but all aspects of life regardless of whether they constitute human rights or not: Article 26 International Covenant on Civil and Political Rights. The Pact of San José and Protocol 12 to the ECHR, unlike the Banjul Charter, enshrine analogous protection: Article 24 American Convention on Human Rights; Article 1 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000) ETS 177.

of equality of men and women, of human rights and fundamental freedoms.³ Therefore, discrimination is confined to *one* sexed identity group. CEDAW focuses on discrimination against women rather than *any* form of discrimination on the basis of sex.⁴ This fixed-identities approach ('women') is particularly surprising in the light of the model followed by the drafters of CEDAW, that is, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),⁵ which adopts a category-of-discrimination ('race') approach by prohibiting all forms of race discrimination.⁶

³ Article 1 Convention on the Elimination of All Forms of Discrimination against Women (1979) 1249 UNTS 13.

⁴ Jacobson, 'The Committee on the Elimination of Discrimination against Women' in Alston (ed), *The United Nations and Human Rights: A Critical Appraisal* (OUP 1992) 444, 446.

⁵ Article 1(1) reads: 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life'; International Convention on the Elimination of All Forms of Racial Discrimination (1965) 660 UNTS 195.

⁶ Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20 *Columbia Journal of Gender and Law* 98, 147-148. CEDAW was the model for the definition of discrimination against women enshrined in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), although this excludes any reference to 'equality' between women and men: Article 1(f) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) CAB/LEG/66.6. This choice was due to the refusal by some state parties of the draft guaranteeing equal rights for men and women; this relates to the equity versus equality debate, particularly lively in – but not exclusively – the African context: similar discussions became crystallised in the objections advanced during the drafting of and several reservations made to CEDAW: see Banda, 'Blazing a Trail: The African Protocol on Women's Rights Comes into Force' (2006) 50 *Journal*

Many have proposed rethinking the metonymic stance of CEDAW, for which gender is synonymous with women. For instance, the object and the purpose of the Convention have been the pole stars in testing the stretchability of its scope, that is to what extent it could apply to gendered subjects other than women. In the absence of a definition of who is a ‘woman’ in the text of CEDAW, the indeterminacy of the term has been read as inclusive of trans individuals, with CEDAW providing protection also to them.⁷ Instead of addressing the legal category of ‘woman’ across the Convention, another line of research builds on one specific provision, Article 5(a) on gender stereotyping, that is the process of attributing to an individual specific characteristics or roles only because of their sex/gender in ways that infringe human rights.⁸ This provision states that:

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.⁹

of African Law 72, 74. The Istanbul Convention and the Convention of Belém do Pará do not define discrimination against women: Article 3 Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) ETS 210; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) OASTS A-61.

⁷ Meyer, ‘Designing Women: The Definition of “Woman” in the Convention on the Elimination of All Forms of Discrimination Against Women’ (2016) 16(2) *Chicago Journal of International Law* 553.

⁸ Cook and Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press 2010) 9-31.

⁹ Article 5(a) Convention on the Elimination of All Forms of Discrimination against Women.

This provision requires states to modify the cultural attitudes underlying wrongful gender stereotyping as part of their duty to combat gender-based discrimination. In the light of the focus of Article 5(a) on ‘cultural patterns of conduct,’ some have questioned – providing a rather negative answer – whether CEDAW’s drafters have used this provision to address at least some of the aspects of the rights to gender identity and sexual freedom of LGBTI people.¹⁰ Relying on Article 5(a), other approaches have suggested, more radically, to shift the focus from the group of women to the category of gender.¹¹ I join the latter efforts with this investigation, by unveiling what Article 5(a) can do for *all* of us. Article 5(a) is, indeed, a provision with a disruptive interpretive potential. Albeit contained in an instrument (CEDAW) focused on one specific gendered group (‘women’), I argue that Article 5(a) may secure protection for all gendered individuals thanks to its symmetrical conception of sex/gender in relation to men-women as well as inferiority–superiority.

What follows is thus a hermeneutic effort aimed at uncovering whether this symmetrical scheme of the provision supports multiple configurations of gendered domination/subordination. This enquiry articulates gender power differentials in the form of symmetrical dualism of men and women, who can both be conceived as inferior or superior. This is a normative investigation on the promises of Article 5(a), also addressing the impact of gender stereotypes on individuals from a queer perspective¹² with

¹⁰ Holtmaat and Post, ‘Enhancing LGBTI Rights by Changing the Interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?’ (2015) 33 *Nordic Journal of Human Rights* 319.

¹¹ Rosenblum (n 6) 95–96; Otto, ‘Queering Gender [Identity] in International Law’ (2015) 33 *Nordic Journal of Human Rights* 299, 303.

¹² Heathcote, *Feminist Dialogues on International Law: Successes, Tensions, Futures* (OUP 2019); Otto, ‘Introduction: Embracing Queer Curiosity’ in Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge 2018); Robinson, ‘Masculinity as Prison: Sexual Identity, Race, and Incarceration’ (2011) 99

psychoanalytical resonances. While women's oppression is structural in its nature, and historical in its origins, predominance by men is one among the many possibilities of gendered postures. Wrongful stereotypes can therefore concern both women and men. Harmful and harmless performances as well as ideas of masculinities and femininities are attached to both women and men, as well as any other subject whose identification transcends the binary. The analysis shows that a gender-based stereotype could limit the rights of both/either women and/or men; and that domination and subordination resulting from superiority and inferiority respectively are gender-ed and gender-ly unstable.¹³

Article 5(a) is unique also from the viewpoint of subject formation, that is the process to which the subject comes to shape their existential possibilities. Opening to diverse combinations between the gendered subject and the role that socio-legal structures expect from them, the provision embraces human diversity in that it recognises that each individual is free to decide – consciously or unconsciously – who they want to be, without feeling constrained by pre-established understandings of femininity and masculinity. Nevertheless, while individuals should be legally free from external impositions, their choices depend also on the recognition by the other, in the twofold sense of both the persons surrounding us (the 'other')

California Law Review 1309, 1331; Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2006); Albertson Fineman et al. (eds), *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Routledge 2009); Hearn, 'From Hegemonic Masculinity to the Hegemony of Men' (2004) 5 *Feminist Theory* 49; Cossman, 'Sexuality, Queer Theory, and "Feminism After" – Reading and Rereading the Sexual Subject' (2003) 49 *McGill Law Journal* 850; Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society' (1995) 83 *California Law Review* 3, 72.

¹³ Committee on the Elimination of Discrimination against Women, General Recommendation No. 35: Gender-based violence against women, updating General Recommendation No. 19 (2017) para 35(a).

and the socio-legal structures in which each of us is immersed (the ‘Other’).¹⁴ The same social and legal norms can have a different impact on different subjects. Among these rules, gender stereotypes enshrine some of the expectations of a given socio-cultural system, acting on the individuals’ unconscious along with the subject’s own personal determination.¹⁵ The outcome of this process of interiorisation (of the external norm) and fusion (of externally and internally driven positionalities) is unpredictable. Reinterpreting CEDAW through the lens of Article 5(a) is, therefore, not only a theoretical endeavour, but also a practical exercise that makes the (rights spelled out in the) Convention a place for subjective formation, expression, and transformation.

Against this backdrop, this article first delves into the interpretive possibilities of Article 5(a) CEDAW. I draw a parallel between CEDAW and ICERD (Section 1), examining the definition of discrimination (Section 1.1) and the personal scope of application (Section 1.2). Having scrutinised the commonalities and discrepancies between the two instruments, the investigation moves to the concept of gender stereotyping contained in Article 5(a). The obligation to change culture, beside written laws, is instrumental to the eradication of wrongful gender stereotypes that lie at the root of discrimination (Section 2). The analysis of the norm on stereotypes involves consideration of what gender stereotyping is, i.e. its content (Section 2.1), and how the provision condemning it can be practically used, i.e. its susceptibility to litigation or justiciability (Section 2.2). The universal principles of equality, diversity and freedom underpinning Article 5(a) guarantee that individuals have the right to decide what means to them to

¹⁴ See, among others, Lacan, *Le Séminaire. Livre V: Les formations de l’inconscient* (Miller ed., Seuil 1998) 189; Lacan, ‘L’istanza della lettera dell’inconscio o la ragione dopo Freud’ in Lacan, *Scritti, Volume I* (Contri tr, Einaudi 1978) 490.

¹⁵ Lacan, *Il Seminario. Libro XI: I quattro concetti fondamentali della psicoanalisi* (Miller and Di Ciaccia eds, Einaudi 2003) 128; Lacan, *Il Seminario. Libro XVIII: Di un discorso che non sarebbe del sembiante (1971)* (Di Ciaccia and Miller eds, Di Ciaccia tr, Einaudi 2010) 26.

be, and perform, a specific gendered subjectivity regardless of socio-cultural constraints. A psychoanalytically inspired digression explains the role these socio-cultural constraints play in the formation of gendered subjectivities (Section 2.3). A final reading of the concepts of diversity and freedom from the perspective of both human rights and psychoanalysis support the reinterpretation of Article 5(a) as protecting all gendered subjectivities (Section 3), overcoming the dualism of male/female (Section 3.1) and opening up to endless combinations of gendered roles, attitudes and behaviours (Section 3.2). The conclusion calls for a shift from the asymmetrical to the symmetrical conception of sex/gender in relation to men-women as well as inferiority-superiority.

II CEDAW AND ICERD: ANALOGIES AND DIVERGENCES

CEDAW is an asymmetric instrument, with a personal scope of application as to its beneficiaries, ‘women.’ By adopting an asymmetrical definition of discrimination, CEDAW targets the sexed group of women, as opposed to the other sexed group of men. The treaty centers on discrimination against women, rather than any form of sex-based discrimination.¹⁶ ICERD has been the model for CEDAW, so comparing the content of the two instruments may be of help for the sake of systematic interpretation in the human rights regime. As anticipated above, the drafters of CEDAW were inspired by ICERD, beginning with the definition of discrimination.¹⁷ Yet, the fixed-identities approach of CEDAW (‘women’) seems to conflict with the category-of-discrimination (‘race’) approach of ICERD. In fact, ICERD

¹⁶ Jacobson (n 4) 446; on the historical reasons for the women-only focus, see also Hernandez-Truyol, ‘Unsex CEDAW? No! Super-Sex It!’ (2011) 20 *Columbia Journal of Gender and Law* 195, 215.

¹⁷ Article 1(1), International Convention on the Elimination of All Forms of Racial Discrimination.

prohibits all forms of race discrimination,¹⁸ although, in practice, it does not apply to all groups, but only to those which are victim of discrimination.

Article 5(a) CEDAW has attracted little attention so far, especially concerning the architecture of gender relations it embeds.¹⁹ Notwithstanding the specific personal scope of the covenant ('women'), Article 5(a) CEDAW expresses some general principles which have validity beyond the scope of application of the treaty, including: (i) the definition of discrimination; (ii) the symmetrical understanding of the category; and (iii) the obligation to change culture, in addition to laws. CEDAW shares these principles with ICERD. Therefore, the reinterpretation of Article 5(a) CEDAW as covering individuals other than women is supported by a number of analogies between CEDAW and ICERD. As the following sections will show, several interpretive questions surround Article 5(a) CEDAW, including: the coexistence of the vocabulary of 'sex' and 'gender' in the same provision; the construction of gender in dualistic terms ('men and women'); and the symmetry between gendered subjectivities and power postures. Relying on a comparative analysis of the common elements

¹⁸ Rosenblum (n 6) 147-148.

¹⁹ With some notable exceptions, including Anderson, 'Violence against Women: State Responsibilities in International Human Rights Law to Address Harmful "Masculinities"' (2008) 26 *Netherlands Quarterly of Human Rights* 173; Holtmaat, *Towards Different Law and Public Policy: The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination* (Ministry of Social Affairs and Employment in the Netherlands, 2004), available at: <https://scholarlypublications.universiteitleid.nl/handle/1887/41992> accessed 9 June 2023]; Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry' in Davies and Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2013) 197, 204-205; Sepper, 'Confronting the Sacred and Unchangeable: The Obligation to Modify Cultural Patterns under the Women's Discrimination Treaty' (2008) 30 *University of Pennsylvania Journal of International Law* 585; Burrows, 'The 1979 Convention on the Elimination of All Forms of Discrimination Against Women' (1985) 32 *Netherlands International Law Review* 419, 428-9; Cusack and Cook (n 8) 72-107.

between CEDAW and the ICERD, I posit below that CEDAW, and particularly Article 5(a), expresses many general principles which have validity beyond the scope of application of the treaty ('women').

1. Definition of Discrimination

The definition of discrimination contained in ICERD was the model for the drafters of CEDAW. The two definitions read almost the same. For both, discrimination is 'any distinction, exclusion, restriction' (or 'preference' for ICERD). Under ICERD, discrimination is seen on the basis of 'race, colour, descent, or national or ethnic origin,' whereas discrimination is founded in 'sex' for CEDAW. The implicit or explicit consequences, and the objective, of the distinction, exclusion or restriction are similar for both instruments. The act or omission amounts to discrimination where it has the 'purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural or any other field' (of public life, for ICERD).²⁰ The two definitions therefore appear substantially identical. Nevertheless, a few but crucial differences exist, which influence the understanding of discrimination underlying each of the treaties, as the next subsection explains.

2. Personal Scope of Application

At first glance, it seems that both ICERD and CEDAW embrace a category-of-discrimination approach. CEDAW prohibits discrimination based on 'sex,' ICERD on 'race, colour, descent, or national or ethnic origin.' Yet, the sex-based discrimination of CEDAW is limited to sex-based discrimination against women. Article 1 CEDAW specifies that discrimination hampers the recognition, enjoyment or exercise of rights and freedoms 'by women,' while Article 1(1) ICERD does not refer to any specific racial, ethnic or

²⁰ See Article 1 International Convention on the Elimination of All Forms of Racial Discrimination; Article 1 Convention on the Elimination of All Forms of Discrimination against Women.

national group. The definition of discrimination provided by ICERD is category-based (race) rather than group-based ('black'). CEDAW mimics ICERD in its definition but adopts the asymmetrical approach with the personal scope of application of non-discrimination covering only one group ('women') rather than the category (gender). ICERD adopts a symmetrical view of the groups involved, with ethnic, racial and national markers. CEDAW asymmetrically articulates the conception of gender – or 'sex' to be faithful to the letter of the treaty – in the definition of discrimination and its general personal scope. Therefore, CEDAW adopts a formulation of equality which seems symmetrical. That is, gender power relations are not portrayed exclusively as male domination over female oppression, but they rather take the shape of many possible symmetrical relations. While ICERD avoids dualistic and group-based approaches ('on an equal footing'), CEDAW explicitly uses the expression 'on a basis of equality of men and women.'

In brief, the principle of symmetry is reflected in the whole ICERD. The configuration of the categories (gender/race) on which the discrimination is based, is asymmetrical and symmetrical for the CEDAW and ICERD respectively. A reinterpretation of Article 5(a) CEDAW following the principle of symmetry as referring to all gender-based discrimination, including but not limited to women-targeting discrimination, renders CEDAW compatible with ICERD.

II. STEREOTYPES

Ascribing to an individual specific characteristics or roles by reason only of their sex/gender in ways that violates human rights amounts to sex/gender-based discrimination. As seen in the Introduction, Article 5(a) CEDAW deals

with gender stereotyping by incorporating the obligation to change culture, in addition to the law:²¹

States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on *the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women*.²² (emphasis added)

Article 5(a) CEDAW develops consideration 14 of the Preamble. In the Preamble, the drafters of CEDAW recognised the interrelation between socio-cultural conceptions and gender equality: ‘a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.’²³ Other international instruments contain formulations similar to Article 5(a) CEDAW, such as the Maputo Protocol²⁴ and the Convention of Belém do Para.²⁵ The socio-cultural prejudices, patterns of conduct, customary and

²¹ See Sepper (n 19) 595; Steiner and Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 2nd edn (OUP 2000) 179.

²² Article 5(a) Convention on the Elimination of All Forms of Discrimination against Women.

²³ Preamble *ibid*.

²⁴ Article 2(2): ‘States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men’; see also Article 4(2)(d): Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

²⁵ Article 7(e): ‘The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: [...] (e) take all appropriate measures, including legislative measures, to amend or repeal existing laws and

other ideas about the superiority or inferiority of either of the sexes referred to in Article 5(a) CEDAW, and the above mentioned analogous provisions can be grouped under the label of ‘gender stereotypes.’²⁶ Article 5(a) CEDAW recognises that gender stereotypes constitute the roots of discrimination – for the moment: against women.

The CEDAW Committee stressed the importance of Article 5(a) CEDAW in one of its first interpretive documents, namely General Recommendation 3 of 1987.²⁷ It noted that stereotyped conceptions of women (here, no reference to men), having a socio-cultural basis, perpetuate discrimination and hamper the implementation of Article 5 CEDAW.²⁸ The article is referred to in many other Committee’s interpretive documents,²⁹ as well as

regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; [...]’; Article 8(b): ‘The States Parties agree to undertake progressively specific measures, including programs: [...] (b) to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women; [...]’; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

²⁶ Freeman, Chinkin and Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012) 142.

²⁷ Committee on the Elimination of Discrimination against Women, General Recommendation No. 3: Education and public information campaigns (1987).

²⁸ *Ibid.*

²⁹ For example, Committee on the Elimination of Discrimination against Women, General Recommendation No. 12: Violence against Women (1989) Preamble, para 1; Committee on the Elimination of Discrimination against Women, General Recommendation No. 14: Female circumcision (1990) Preamble, paras 2, 5; CEDAW Committee, General Recommendation No. 19 (n 13) paras 11, 12, 21–3, 24(d)–(f), (t)(ii); Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (Women and Health) (1999) para 12(b), 28.

in the report of the special enquiry conducted in Mexico under the Optional Protocol to CEDAW.³⁰ Among the interpretive documents, CEDAW's General Recommendation 25 of 2004 on temporary special measures evidently states that Article 5, in conjunction with other treaty provisions, forms the 'general interpretative framework for all the Convention's substantive articles.'³¹ The Committee also establishes that it is integral to states parties' obligations to address the 'persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.'³² States shall undertake the relevant measures to transform those gender power relations which cause inequalities. The Committee stresses that the modification and the elimination of socio-cultural preconceptions and practices should rely on the contextual consideration of the lives of both women and men.³³

The connection between CEDAW and ICERD is close as regards the cultural practices and stereotypes which lead to discrimination. Particularly, Article 7 ICERD requires states to promote various measures in the realm of culture, education and teaching in order to combat those prejudices which cause racial discrimination.³⁴ Article 5(a) CEDAW in concert with Article 2(f) CEDAW, in fact obliges states 'to take all appropriate measures,

³⁰ Committee on the Elimination of Discrimination against Women, Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under Article 8 of the Optional Protocol to the Convention, and Reply from the government of Mexico (2005) paras 56–7.

³¹ Committee on the Elimination of Discrimination against Women, General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures) (2004) para 6.

³² *Ibid* 7.

³³ *Ibid* 10, 38; on the role of the Committee in eliminating gender stereotyping, see Cusack and Cook (n 8) 131–172.

³⁴ Article 7 International Convention on the Elimination of All Forms of Racial Discrimination.

including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.³⁵ Therefore, states shall eliminate those discriminatory gender stereotypes on which ‘laws, regulations, customs and practices’ rely. In other words, Article 5(a) CEDAW, read in conjunction with Article 2(f) CEDAW, recognises that any distinction, restriction or exclusion based on, or linked to, a gender stereotype amounts to discrimination against women. States shall eliminate the causes of discrimination and thereby the roots of gender stereotypes.³⁶

1. *The Type of Stereotypes*

Article 5(a) CEDAW provides for the fundamental right of both women and men not to be relegated to fixed constructions of masculinity and femininity.³⁷ The norm condemns preconceptions based on the supposed inferiority and superiority of one over the other genders – with the text at first glance not seeming to transcend the binary.³⁸ The notion of superiority is not unique to CEDAW but has its precedent in ICERD. Under Article 4 ICERD, states shall condemn, among other things, ‘all propaganda and all organizations which are based on *ideas or theories of superiority* of one race or

³⁵ Article 2(f) Convention on the Elimination of All Forms of Discrimination against Women.

³⁶ Freeman, Chinkin and Rudolf (n 26) 145; cf Cusack and Cook (n 8) 72–76, 111; see Committee on the Elimination of Discrimination against Women, Concluding observations regarding Madagascar, 7 November 2008, CEDAW/C/MDG/CO/5 para 16; Committee on the Elimination of Discrimination against Women, Concluding observations regarding Burundi, 8 April 2008, CEDAW/C/BDI/CO/4 para 17; cf Article 2(f) Convention on the Elimination of All Forms of Discrimination against Women; Committee on Economic, Social and Cultural Rights, General Comment No 20: Non-discrimination in economic, social and cultural rights (Art. 2, Para. 2) (2009) para 20.

³⁷ Cusack and Cook (n 8) 68.

³⁸ I discuss whether or not the provision is ultimately relegated to the gender binary, see below, Sect 3.

group of persons of one colour or ethnic origin³⁹ (emphasis added). Article 5(a) CEDAW echoes Article 4 ICERD in its structuring around the notion of superiority of one gender (men) over another (women).

The parallelism between ICERD and CEDAW continues with the enumeration of other states' obligations under the respective covenants. ICERD comes close to the obligation to modify social practices. Article 2(1) ICERD establishes the state's duty 'to engage in no act or practices of racial discrimination' and 'not to sponsor, defend or support racial discrimination by any persons or organizations.'⁴⁰ States shall also 'prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination.'⁴¹ While ICERD does not use the word 'stereotype' explicitly, it is nevertheless implied, in the light of the above-mentioned reference to 'ideas or theories of superiority of one race or group of persons of one colour or ethnic origin'⁴² enshrined in Article 4 ICERD.

The scope of Article 5(a) CEDAW specifies which gender stereotypes should be banned. The clause italicised above on the inferiority or superiority of either of the genders demarcates the area of prohibited stereotypes. The modification of culture should target only those gender stereotypes which have the direct or indirect effect of leading to: women's subordination; inequality between genders; legal, social, cultural and/or economic deprivation. According to a teleological interpretation of Article 5(a), the purpose of the Convention 'cannot be to eradicate or abolish all gender stereotypes, but only to transform or modify those stereotypes that are detrimental to the realisation of women's human rights.'⁴³ Again, not all

³⁹ Article 4 International Convention on the Elimination of All Forms of Racial Discrimination.

⁴⁰ Article 2(1) *ibid.*

⁴¹ Article 2(1)(d) *ibid.*

⁴² Article 4 *ibid.*

⁴³ Freeman, Chinkin and Rudolf (n 26) 149.

gender stereotypes should be eliminated, but only those leading to discrimination.⁴⁴

There are two types of stereotypes: some have positive content and others are negative. Both typologies of stereotypes play a role in the construction of unbalanced gendered relations.⁴⁵ A stereotype which is positive in nature can be negative for the detrimental impact it has on the individual's rights. States shall change culture in order to transform *harmful* stereotypes more generally, including those so-called 'benevolent' stereotypes ascribing favourable attributes to one gendered category, e.g., women as tender mothers and sensitive individuals. The criterion to distinguish between good and bad relies on the effect that the stereotype produces rather than its actual content, such as the denial of individual worth and dignity ('recognition effects')⁴⁶ and denial of fair allocation of public goods ('distribution effects').⁴⁷ In *Vertido v Philippines*, for example, CEDAW Committee elaborated the harm produced by specific stereotypes, unlike earlier communications such as *AT v Hungary*⁴⁸ and *Goekce v Austria*.⁴⁹ Wrongful gender stereotypes named in *Vertido* hold that 'a rape victim must try to escape at every opportunity';⁵⁰ 'a man in his sixties would be not capable of rape';⁵¹ 'rape is a crime of lust or passion associated with love and desire requiring ejaculation'⁵² and 'women who are not timid or not easily cowed are less

⁴⁴ See Cusack and Cook (n 8) 20-24.

⁴⁵ See Appiah, 'Stereotypes and the Shaping of Identity' (2000) 88 *California Law Review* 41; Freeman, Chinkin and Rudolf (n 26) 147.

⁴⁶ Cf CEDAW Committee, General Recommendation No. 25 (n 34) para 7; Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 *University of Toronto Law Journal* 291, 301-302.

⁴⁷ See Fraser, *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge 1997) 11-39; Cusack and Cook (n 8) 59-70.

⁴⁸ *AT v Hungary* (n 61).

⁴⁹ *Goekce v Austria* (n 61).

⁵⁰ *Vertido v The Philippines* (n 61) para 3.5.1.

⁵¹ *Ibid* para 3.5.7.

⁵² *Ibid* para 3.5.6.

vulnerable to sexual attacks.⁵³ Each of these, irrespective of the nature of their content, is a gender-based stereotype that prevents the enjoyment of human rights by causing harmful effects.

2. *Justiciability*

But can Article 5(a) CEDAW be actually *used* against gender stereotyping, thereby sustaining a non-binary reading of the Convention? In other words, how susceptible to adjudication is the provision? Article 5(a) CEDAW is one of the general provisions of the Convention (Articles 1-5 and 24). The CEDAW Committee has specified the function performed by Article 5(a) in the framework of the Convention. Article 5(a) is to be read in combination with the other obligations spelled out in CEDAW. General Recommendation 25 explains that the article serves as both a substantive provision and an interpretive tool.⁵⁴ Additionally, the Committee has stressed the crossover relevance of the provision in concluding observations.⁵⁵ In contrast, at the domestic level, the justiciability of Article 5 is still disputed. The opponents of justiciability refer to: (1) the indeterminacy of the provision, with specific regard to the definitory gaps of key concepts such as ‘inferiority,’ ‘superiority’ and ‘stereotyped roles;’ (2) the extra-legality of the objective of eradicating role-models and broadening women’s freedom of choice;⁵⁶ (3) the soft-law character of the provision.⁵⁷ Underlying these claims is a misconception about – international human

⁵³ Ibid para 3.5.2.

⁵⁴ See CEDAW Committee, General Recommendation No. 25 (n 34) para 6; Sepper (n 19) 596.

⁵⁵ Committee on the Elimination of Discrimination against Women, Concluding observations regarding Guatemala, 12 April 1994, A/49/38 para 78.

⁵⁶ Freeman, Chinkin and Rudolf (n 26) 166-167; on the objection to a broad interpretation of Article 5(a) and on the question as to whether law can change culture, see Sepper (n 19) 627-629.

⁵⁷ Packer, *Using Human Rights to Change Tradition: Traditional Practices Harmful to Women’s Reproductive Health in Sub-Saharan Africa* (Intersentia 2002) 54.

rights treaties in the case of (3) and – Article 5(a) CEDAW. As outlined above, the provision is to be interpreted as a substantial as well as an interpretive norm. It obliges states to modify discriminatory laws, norms and customs based on gender stereotypes and, simultaneously, it serves as a means through which to understand other rights and duties established in CEDAW.

The justiciability of the norm is also proved by the fact that the Committee has indeed heard different cases brought under Article 5.⁵⁸ Hence, Article 5(a) CEDAW, in its combined interpretive and substantive form, is the base against which gendered norms and practices can be tested in order to evaluate their contribution to human rights abuses.⁵⁹

3. Equality, Diversity, Freedom

The substantive nature and the justiciability of Article 5(a) CEDAW is further substantiated by the universal principles the provision enshrines. Article 5(a) comprises three principles: equality, diversity and freedom. The norm recognises equality between men and women advancing a transformative perspective which goes beyond the principles of substantive as well as formal equality.⁶⁰

The term ‘symmetry’ that I (and the literature on this topic) use to describe the structure of Article 5(a) as making it applicable to diverse gendered subjects might conjure up the bleak scenario of formal approaches to equality.⁶¹ Nevertheless, arguing for the interpretation of a norm incorporating a symmetrical configuration of gender stereotypes is not

⁵⁸ See *AT v Hungary* (2/2003), CEDAW/A/60/38; *Goekce v Austria* (5/2005), CEDAW/C/39/D/5/2005; *Yildirim v Austria*, (6/2005) CEDAW/C/39/D/6/2005; *Vertido v The Philippines* (18/2008), CEDAW/C/46/D/18/2008.

⁵⁹ See Freeman, Chinkin and Rudolf (n 26) 165.

⁶⁰ Holtmaat (n 19) xii.

⁶¹ I am indebted to the anonymous reviewer for warning about the dangers of emphasising the symmetrical architecture of Article 5(a).

synonymous with supporting formal conceptions of equality disregarding the systemic discrimination of women in a genetically patriarchal socio-legal system.

In fact, a symmetrical scheme that neglects gendered power differentials embedded in a given society, such as the disproportionate subjection of women to discrimination, assumes that both terms of comparison occupy the same position in the grid of power relations.⁶² It thus follows that non-discrimination becomes an instrument of justice for any of the ‘two genders’ suffering a certain disadvantage without reasonable and objective justification.⁶³ This is a form of gender equality neutrally and acontextually framed, with which the practice of EU anti-discrimination law is quite familiar. The contested effect is that men can appeal the non-discrimination norm to claim that they have been disadvantaged compared to women.⁶⁴ However, the personal scope of application of Article 5(a) attaching roles of inferiority and superiority to both women and men substantiates the claim that gender stereotypes affect all gendered individuals. While women are structurally disadvantaged, it is also true that men’s rights can be violated and men can be victims of gender-based harm. Further, men-targeting abuses on the basis of their gender are frequently entrenched in those stereotypes

⁶² Byrnes, ‘The Committee on the Elimination of Discrimination against Women’ in Hellum and Aasen (eds), *Women’s Human Rights: CEDAW in International, Regional and National Law* (2013) 27; Holtmaat, ‘The CEDAW: A Holistic Approach to Women’s Equality’ in Hellum and Aasen (eds), *Women’s Human Rights: CEDAW in International, Regional and National Law* (2013) 95–124.

⁶³ Fredman, *Discrimination Law* (OUP 2011) 8.

⁶⁴ Some examples come from the areas of protection of motherhood and occupational pension schemes: see, on the latter, where the applicant argued that he had been discriminated against on the ground of sex (and age) because the state’s law affected him more negatively than women (and younger) workers: Case C–223/19 *YS v NK AG* ECLI:EU:C:2020:753 paras 45, 49, 52.

restricting their existential possibilities to a limited range of attributes and behaviours.⁶⁵

And it is well known that CEDAW secures in many of its articles women's rights 'on a basis of equality of men,' thereby recalling a formal kind of equality. But the Convention obliges states to achieve *de facto equality* of women through the adoption of temporary special measures aimed at eliminating the roots of women's oppression.⁶⁶ This type of equality, i.e. substantial equality, takes into account the different sites of domination and subordination that 'women and men' inhabit, with a view to eradicating the obstacles to and accelerating the advancement of gender equality.⁶⁷ Article 5(a) CEDAW has a symmetrical skeleton, postulates substantial equality, but it should be read from a transformative perspective according to a view of CEDAW as a living instrument that can tackle ever-changing social phenomena. Sandra Fredman has notably shown that substantive equality conceived as transformation assumes a four-dimensional format in that it requires: 'to redress disadvantage; to address stigma, stereotyping, prejudice and violence; to enhance voice and participation; and to accommodate

⁶⁵ See Collier, 'Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender' (2010) 33 *Harvard Journal of Law and Gender* 431, 439; Rumney, 'Gay Male Rape Victims: Law Enforcement, Social Attitudes and Barriers to Recognition' (2009) 13 *International Journal of Human Rights* 233, 235–236; Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality' (2005) 27 *Human Rights Quarterly* 1274.

⁶⁶ On temporary special measures, see Article 4 Convention on the Elimination of All Forms of Discrimination against Women; CEDAW Committee, General Recommendation No. 19 (n 13); CEDAW Committee, General Recommendation No. 25 (n 34).

⁶⁷ Boerefijn et al. (eds), *Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of all forms of Discrimination Against Women* (Intersentia 2003).

difference and achieve structural change.’⁶⁸ Aiming for transformative equality means

re-structuring society so that it is no longer male-defined. Transformation requires a redistribution of power and resources and a change in the institutional structures which perpetuate women’s oppression.⁶⁹

This multi-dimensional approach also implies that equality should be responsive to the context, particularly to the demands of those subjectivities who have remained ignored, excluded, demeaned or disadvantaged.⁷⁰ The obligation to change culture involves all these dimensions, applied to the realm of gender. But in which way does Article 5(a) protect individuals from gender stereotyping? How does this protection relate to freedom to live one’s gender(s) beyond imposed socio-cultural norms?

Article 5(a) secures individuals’ freedom to decide what it means to ‘be’ a man or (/and) a woman *to them* without being bounded by pre-given understandings of masculinity and femininity. This is the freedom to make one’s own – conscious or unconscious – choices regardless of socio-cultural constraints. In this context, the transformative power of Article 5(a) condemns those gender stereotypes that act on the subject of human rights law by limiting their existential possibilities. From this perspective, the norm sustains freedom and diversity in the law and in relation to the law. Yet, while the right to decide one’s gendered subjectivity should be legally unbound from external constraints, psychoanalytically speaking subjective choices are psychologically dependent on recognition by the other.

⁶⁸ Fredman, ‘Substantive Equality Revisited’ (2016) 14 *International Journal of Constitutional Law* 712, 713; see also Fredman, *Discrimination Law* (n 63); cf Holtmaat (n 19) xii; Fredman, ‘Beyond the Dichotomy of Formal and Substantive Equality: Towards New Definitions of Equal Rights’ in Boerefijn et al. (eds), *Temporary Special Measures: Accelerating De Facto Equality of Women under Article 4(1) UN Convention on the Elimination of all forms of Discrimination Against Women* (Intersentia 2003) 115.

⁶⁹ Fredman, ‘Beyond the Dichotomy of Formal and Substantive Equality’ (n 68) 115.

⁷⁰ Fredman, ‘Substantive Equality Revisited’ (n 68) 713.

One can affirm their sense of who they are only if this self-affirmation is recognised by the others. Therefore, the ‘regardless of’ I used in the previous sentence – the freedom to make one’s own choices *regardless of* socio-cultural constraints – should be intended as ‘without being forced to abide by.’ The subject will be never fully free from what the external world is imbued with, but they can nevertheless decide what to make of social conditionings. In psychoanalytical theory and practice, subjectification is, for instance, the process through which the individual reinvents the way of being and style of inhabiting their body that have already been forged by externally driven social expectations. The impact that the socio-cultural system has on the individual subject may vary. Yet, subjectification assumes the recognition of the impossibility of self-constitution on the part of the subject. This means that the subject cannot constitute their own positionality without elaborating on the expectations of socio-cultural system.⁷¹ It is true that subjectification is a process of heterodetermination involving external entities, including gender stereotypes, acting upon our unconscious. But there is still room for possibilities of individual determination.⁷² Hence, the way in which each individual subjectifies the impact of the cultural constructs is always unique. All this applies also to gender.

Subjectification happens also in the realm of gender. Here, anatomy or cultural expectations do not define alone the shape of gender. Gender identification is the result of the unconscious choice that the individual makes by subjectifying the biological differences of sexes (‘sex’) upon which the socio-legal gendered discourse builds its own expectations (‘gender’).⁷³

This dependency between the subject and the other – conceived of as both a system and an individual – can be better appreciated by borrowing from Jacques Lacan’s understanding of otherness. Otherness has a twofold nature

⁷¹ See, among others, Lacan, *Le Séminaire. Livre V* (n 14) 189; Lacan, ‘L’istanza della lettera dell’inconscio o la ragione dopo Freud’ (n 14) 490.

⁷² Lacan, *Il Seminario. Libro XI* (n 15) 128; Lacan, *Il Seminario. Libro XVIII* (n 15) 26.

⁷³ Cf Morel, *Ambigüités sexuelles: Sexuation et psychose* (Anthropos 2000) 143.

in the psychoanalytical jargon: ‘other’ is the person with whom we interact, while ‘Other’ is the socio-cultural system where we are all born and live.⁷⁴ The notion of Other diverges from the otherness present in many human rights critiques on exclusionary laws and practices on grounds of, for example, race, gender, ethnicity, language, or class. More precisely, the Other is the structure in which the individual is immersed. It is the symbolic system of language, which materialises in the discourses of history, law, education, culture and family. Hence, the norms of gender are a clear example of the Other.⁷⁵ Rather than a subject, the Other is a site: the place where the subject speaks and exists. In contrast, the ‘other’ is the individual who the flesh-and-bone subject of actions and thoughts encounters throughout their existence.

Overall, being an enormous grid of intrusive expectations, wrongful gender stereotyping forms a great part of the gendered discourse. Therefore, gender stereotyping is an expression of the Other and takes shape through the other’s acts. The right to be free from every discrimination deriving from gender stereotyping is set out loud in CEDAW and descends from the universal principles enshrined in human rights law. Yet the impact that stereotypes have concretely on the subject may well transcend the harm legally determined by a court, stemming also from the tension between the individual positioning and the constraining societal norms.

III. SCOPE FOR REINTERPRETATION

This section advances a renewed interpretation of Article 5(a) CEDAW having in mind the above comparisons between CEDAW and ICERD, and the interdependency of socio-cultural system and subjective gendered

⁷⁴ Recalcati, *Jacques Lacan: Desiderio, godimento e soggettivazione*, vol 1 (Raffaello Cortina 2012) 68, 352.

⁷⁵ For an analysis of how gender norms demarcate and shape the subject, see Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 190; Butler, *Bodies That Matter: On the Discursive Limits of ‘Sex’* (Routledge 1993) 59–60.

(unconscious) choices. The reinterpretation concerns two separate yet intertwined questions: (i) the possibility for CEDAW to open up to the protection of plural gendered subjectivities; and (ii) the potential for Article 5(a) to disrupt the binary configuration of male/female that constitutes the essence of mainstream interpretations of CEDAW. Each of these aspects is treated in the following subsections respectively.

1. All-Gender Approach

The *first* argument for all-gendering CEDAW is the divergence between CEDAW and the Declaration on the Elimination of Discrimination against Women (DEDAW).⁷⁶ The origins of Article 5(a) CEDAW can be found in Article 3 DEDAW. Yet, the text of its source of inspiration approaches gender relations differently than Article 5(a) CEDAW. Article 3 DEDAW reads:

All appropriate measures shall be taken to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the *idea of inferiority* of women. (emphasis added)

Article 5(a) CEDAW goes beyond Article 3 DEDAW for two reasons. First, the former sets out the modification of ‘social and cultural patterns of conduct,’ while the latter only refers to ‘educate public opinion and to direct national aspirations towards the eradication of prejudice.’⁷⁷ Secondly, Article 3 DEDAW targets prejudices and practices based on the ‘idea of inferiority of women.’ The provision, dated 1967, places women in the position of inferiority, without presenting superiority and inferiority as alternatives for either of the genders. Article 5(a) CEDAW does not reproduce the asymmetry enshrined in Article 3 DEDAW. The genealogy of the symmetry incorporated in Article 5(a) CEDAW traces back to the Draft

⁷⁶ Declaration on the Elimination of Discrimination against Women (adopted 7 November 1967) A/RES/2263(XXII).

⁷⁷ See Cusack and Cook (n 8) 72–73.

Convention on the Elimination of All Forms of Discrimination against Women, combining the proposals of the USSR and the Philippines.⁷⁸ Unlike DEDAW, the draft read: ‘any advocacy of the superiority of *one sex over the other* and of discrimination on the basis of sex shall be prohibited by law’⁷⁹ (emphasis added).

This is a crucial difference, that also supports the *second* argument for all-gendering CEDAW. The part of Article 5(a) italicised above – the ‘idea of inferiority of women’ – indicates another specificity which the norm incorporates, besides the obligation to change culture. What is less often recognised is that Article 5(a) introduces a symmetrical conception of ‘sexes’ in relation to ‘men and women,’ and so does the same for gender. Through this phrasing, the provision acknowledges that inferiority and superiority are two postures which can be occupied by ‘either of the two sexes.’ This is especially surprising given not only the historical source of inspiration of the provision (DEDAW), but also the context where such a symmetrical configuration of gendered positionalities is found (CEDAW). The articulation of gender-based discrimination in CEDAW and, more broadly, the grammar of CEDAW, are ontologically asymmetrical. The objective of the Convention is to eliminate any form of discrimination against women, rather than any form of sex-based discrimination.⁸⁰ As seen, ICERD instead does not name the specific ethnic, racial or national groups which are presumably victims of discrimination. In other words, the text of ICERD is symmetrical but the concrete application will not be. Yet one could argue

⁷⁸ Article 6, later renumbered to Article 5, Draft Convention on the Elimination of All Forms of Discrimination against Women (adopted 20 December 1978) A/RES/33/177; Rehof, *Guide to the Travaux Préparatoires of the United Nations Convention on the Elimination of All Forms of Discrimination against Women* (Brill 1993) 79; Freeman, Chinkin and Rudolf (n 26) 151.

⁷⁹ Article 6, later renumbered to Article 5, Draft Convention on the Elimination of All Forms of Discrimination against Women (n 78).

⁸⁰ Jacobson (n 4) 446; on the historical reasons for women-only focus, see also Hernandez-Truyol (n 16) 215.

that, rather than a virtuous choice, ‘inferiority’ and ‘superiority’ would work hand in hand to the disadvantage of women. They might also be two opposite sides of the same heteronormative coin that CEDAW itself contains. In other words, this symmetry would be only formal since it serves the asymmetrical purposes of the whole CEDAW.⁸¹ This reading is convincing genealogically speaking, but it does not limit the interpretive potential stemming from the symmetrical scheme enshrined in Article 5(a).

As said, many have proposed abandoning the equation (gender = women), shifting the focus from the group of women to the category of gender.⁸² The narrow focus might be overcome through a reinterpretation of Article 5(a) CEDAW. The reinterpretation of this provision relies on the symmetrical dualism of men and women, who can both be construed as inferior or superior. The provision establishes that ‘the idea of the inferiority or the superiority of either of the sexes’ and ‘stereotyped roles for men and women’ can fuel wrongful prejudices and practices. Hence, the reinterpretation of Article 5(a) revolutionises the scope of CEDAW as prohibiting all forms of ‘sex’ discrimination. The *third* argument in favour of the all-gender reinterpretation is the combined reading of Article 5(a) with the Preamble. In the Preamble, CEDAW recalls UDHR, which refers to ‘distinction of any kind,’ such as sex,⁸³ as opposed to the ‘discrimination against women’ enshrined in CEDAW.

Actually, the language of Article 5(a) is dualistic in sexed terms. However, Dianne Otto highlights that the recognition of social and cultural gender practices and stereotypes constitutes the indirect recognition of the fluidity of gender, changeable across cultures and times.⁸⁴ As a consequence, this

⁸¹ My gratitude goes to the anonymous reviewer who advanced this alternative reading of the symmetrical stance.

⁸² Rosenblum (n 6) 95–96; Otto, ‘Queering Gender [Identity] in International Law’ (n 11) 303.

⁸³ Article 2 Universal Declaration of Human Rights.

⁸⁴ Otto, ‘Queering Gender [Identity] in International Law’ (n 11) 303.

renewed method can assist in appreciating the differences and nuances between harmful (hegemonic) and harmless (non-hegemonic) masculinities, as well as dangerous and non-dangerous femininities. Notably, and here comes the *fourth* argument for the all-gender approach, this is confirmed by the recent interpretation contained in CEDAW's General Recommendation 35 on gender-based violence against women. CEDAW acknowledges the existence of 'non-violent masculinities' while urging states to integrate gender equality content targeting gender stereotyped roles 'into curricula at levels of education.'⁸⁵

Finally, the *fifth* argument is linguistic. A rethinking of Article 5(a) CEDAW as protecting all gendered subjectivities is further supported by the fact that the language of the provision is unclear as to how it might be actually implemented.⁸⁶ Article 5(a) covers human rights breaches where preconceptions of inferiority or superiority are attached to femininity or masculinity. The wording of the provision opens up a gender-sensitive as well as gender-inclusive approach to dominative practices generally obscured by prevailing interpretations of CEDAW, and international human rights law more generally. By introducing a nuanced understanding of gender relations, the norm appreciates that gender stereotypes have an impact on the enjoyment of human rights of not only women, but all gendered individuals. This translates into the implicit recognition that masculine and feminine models are manifold and their idealised versions can be either adverse or harmless depending on their context.

2. Infinite Combinations

CEDAW unambiguously embraces the dualism of man/woman under Article 5(a). States are called upon to modify the socio-cultural patterns of conduct of 'men and women' with the aim of eradicating prejudices and practices based on ideas of superiority or inferiority of 'either of the sexes' or

⁸⁵ CEDAW Committee, General Recommendation No. 35 (n 13) para 35(a).

⁸⁶ Freeman, Chinkin and Rudolf (n 26) 143.

on stereotyped roles for ‘men and women.’⁸⁷ CEDAW reiterates the dichotomic conception of gender which in fact underlies the whole instrument. CEDAW is ambiguous in this provision which contains reference to both (1) individuals as men and women, therefore the socialised male and female, and (2) sexes, echoing essentialist understandings of male and female. This alternation of sex and gender might be problematic in the context of gender stereotyping if it is read in the light of General Recommendation 28 of 2010.⁸⁸ General Recommendation 28 distinguishes between sex and gender. To recall the distinction briefly: sex refers to the biological differences between men and women; gender refers to socially constructed traits, identities and roles for women and men. The opposition is nature *versus* culture: sexes are natural, while society gives meaning to biological differences.⁸⁹

This clear-cut distinction can be overcome by exploring alternative accounts of sex/gender and their – institutionally conscious or unconscious – application to human rights law. Indeed, the reference to both sex and gender within the same provision does not pose any major issue if read from the ‘hyperconstructivist’ view I have examined elsewhere.⁹⁰ In short, both sex and gender are constructs. Gender is the social construction of sex, while sex is the result of a cultural inscription at birth based on gendered perceptions. As gender is the construct of another construct, the argument was made that it is a hyperconstruct. Therefore, reference to ‘either of the sexes’ does not bring pure biology into Article 5(a) CEDAW, but rather the

⁸⁷ Article 5(a), Convention on the Elimination of All Forms of Discrimination against Women.

⁸⁸ Committee on the Elimination of Discrimination against Women, General Recommendation No. 28: The core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (2010).

⁸⁹ *Ibid* 5; CEDAW Committee, General Recommendation No. 25 (n 34) fn 2.

⁹⁰ Gilleri, ‘Gender as a Hyperconstruct in (Rare) Regional Human Rights Case-Law’ (2020) 12(2) *European Journal of Legal Studies* 25–42.

outcome of the interpretation of biological elements by the social gaze. To continue the comparison with ICERD, the notions of gender, race and ethnicity are all constructs. As we know, not only gender but also race and ethnicity cannot be explained by referring to ‘nature’ (alone). Ethnicity is a concept used as a proxy for perceptions about culture being inherited through biological descent. As such, it is not devoid of cultural understandings. Likewise, race is a construct to which certain biological elements are attached. Gender, race and ethnicity are three notions construed from the interpretation of so-called biological elements, which is in turn another construct. This stratification of constructions renders them hyperconstructs.

Consequently, the expression ‘either of the sexes’ of Article 5(a) CEDAW is to be interpreted as ‘either of the biological constructs,’ in line with the Inter-American Court of Human Rights’ (IACtHR) reasoning in the advisory opinion *OC-24/17*.⁹¹ This should be also for the sake of systematic interpretation of the human rights vocabulary. In the IACtHR’s opinion, sex is a ‘*construcción biológica*.’ A person is classified male or female at birth according to genetic, hormonal, anatomical and physiological characteristics.⁹² Sex assignment at birth is a social determination based on the other’s and Other’s perception of the new-born’s genitalia.⁹³ The

⁹¹ *OC-24/17, Opinión Consultiva Solicitada Por la República de Costa Rica: Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo* Series A 24 (2017).

⁹² Author’s translation: *ibid* 32(a); Comisión Interamericana de Derechos Humanos, *Orientación Sexual, Identidad de Género y Expresión de Género: Algunos Términos y Estándares Relevantes: Estudio elaborado por La Comisión Interamericana de Derechos Humanos ‘CIDH’ en cumplimiento de la resolución AG/RES. 2653 (XLI-O/11): Derechos Humanos, Orientación Sexual e Identidad de Género* (2012) OEA/Ser.G CP/CAJP/INF.166/12 para 13, <chrome-extension://efaidnbnmnnibpcajpcgclclefindmkaj/viewer.html?pdfurl=http%3A%2F%2Fwww.oas.org%2Fdil%2Fesp%2Fcp-cajp-inf_166-12_esp.pdf&cflen=240720&chunk=true> accessed 9 June 2023.

⁹³ Author’s translation: *OC-24/17* (n 91) para 32(b); cf Comisión Interamericana de

coexistence of sex and gender in the text of Article 5(a) CEDAW is not hermeneutically puzzling if both sex and gender are conceptualised as social constructs. The immanent dualism of male/female of the provision has triggered this elaboration on the supposed ambiguity of the use of sex/gender by the drafters of CEDAW. What is therefore the relation between hyperconstructionist approaches and dichotomous articulations of sex ('either of the sexes')/gender ('men and women')?

The dualism of male/female incorporated into Article 5(a) CEDAW is hardly avoidable. A possible escape route precisely passes through the conception of sex and gender as hyperconstructs. Femininity and masculinity derive from the meaning society ascribes to idealised conceptions of men's and women's roles, attributes, functions and responsibilities. The range of gender stereotypes is wide in terms of practices but limited in terms of categories. Although stereotypes about feminine and masculine behaviours, identities and appearances abound, they exclusively belong to two typologies: the feminine and the masculine. For the purposes of this investigation, the feminine and the masculine constitute a constraining dualism only where they are perpetually attached to women and men respectively. From a legal perspective, conceptions about a certain masculinity and a certain femininity are allowed; there is nothing wrong with stereotyped masculinities and femininities as such. Rather, gender stereotyping becomes legally wrongful when the idealised model imposed on the person on the basis of that specific stereotype results in hampering that person's rights. A whole other story is the fact that legally permissible gender stereotyping can deeply affect the determination of one's gendered subjectivity, as we have seen above.

The combinations of masculinity and femininity on the one hand, and genders on the other hand, are numerous. Even if Article 5(a) explicitly refers to 'men and women' and to 'either of the sexes,' it recognises at the same time that ideals of superiority or inferiority are not the exclusive possession

Derechos Humanos (n 93) para 16; the IACtHR applies the same approach to the case of intersex people.

of the one or the other gender, men (masculine ideal) or women (feminine ideal). If inferiority and superiority may be attributes of both women and men, there also exist femininities idealised as superior as well as masculinities modelled as inferior – and many other forms besides. Therefore, the scheme of masculine domination over female oppression (m > f) is destined to collapse as both the symbols major (>) and minor (<) link masculinities and femininities, masculinities and masculinities, and femininities and femininities, in various configurations. Inferiority and superiority may attach variously to different gendered subjects. Gender stereotyping can assume multiple directions depending on the individual who is portrayed as superior or inferior. The possibility to connote masculinities and femininities in an unfixed manner, that is, depending on infinite configurations of socialised gendered performances, determines that the conception of what it means to perform as a man or as a woman transcends the binary.

What if we cross over from femininity and masculinity to men and women? A man may be feminine, and this is perfectly fine. A woman may be feminine, and this is perfectly fine. A woman may be masculine, and this is perfectly fine. A man may be masculine, and this is perfectly fine. Those who feel that they perform in a masculine/feminine, masculine and feminine, or any other gendered way are dissimilar in their behaviours, attitudes and perceptions to the gendered performance of other masculine/feminine, masculine and feminine or otherwise gendered individuals. The dualism of ‘men and women’ expressed in Article 5(a) CEDAW, read in conjunction with the possibilities opened up by the symmetrical projection of men’s and women’s positionalities as differing inferior or superior ideas, boils down to a formal dichotomy of gender.

To conclude, the dualism of Article 5(a) CEDAW may be substantial, or only dualistic in a literal sense, depending on how sex/gender, and masculinity and femininity, are intended. In line with the argumentation of the IACtHR, sex and gender are both (hyper)constructs. Sex/gender carries multiple connotations depending on the performance of an individual

according to the subjectified sense they make of the societal gender norm. The language of femininity and masculinity, expressed in dualistic terms, does not necessarily correspond to the dualistic nature in which gendered performances are understood in the law and constructed in society. The intersections of inferiority–superiority with femininities–masculinities as set out in Article 5(a) CEDAW clear the path for symmetrical possibilities of domination and subordination, which can be blended and renegotiated so as to include the infinite number of combinations of gendered appearances and performances.

IV. CONCLUSION

Against interpretations (over)emphasising the women-only-focus of CEDAW, this investigation showed that Article 5(a) CEDAW has significant hermeneutic potential. It stands out as a provision presenting a symmetrical, albeit dualistic, architecture of gender relations rather than the asymmetrical focus on women of the rest of CEDAW. Article 5(a) recognises that inferiority and superiority can attach to masculine and feminine positionalities in various ways, paving the way for looking at human rights law through the prism of infinite intersections of subordinate and dominative gendered subjects. This understanding is promising as well as confirmed by the ICERD's symmetrical language. ICERD helps to explain the potential of Article 5(a) CEDAW, its symmetrical design in particular. Indeed, Article 5(a) occupies a special position relative to the rest of the asymmetrical CEDAW. Compared to the group-based asymmetrical articulation of discrimination in CEDAW, ICERD applies a different technique of symmetry or neutrality in its language in respect of all races and ethnicities. At the same time, ICERD can be applied asymmetrically to the benefit of those groups which are discriminated against in practice.

Well beyond formal approaches to equality, the interpretation put forward in this enquiry showed that a substantial change for the protection of all gendered subjectivities can happen by rereading the letter of the existing

law. This is only a small contribution to the greater effort of unsettling those interpretations of human rights law that prevent the protection of all of us, whatever gendered subjectivity in legal and psychoanalytical terms. Article 5(a) CEDAW is perhaps not the panacea for all the gendered harms occurring in our intricate world. Yet, this provision offers space for human rights law to protect manifold gendered subject formations and relations.